

BANK OF COMMERCE (M) BHD

a

v.

SELANGOR FRITS & GLAZES SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR

b

ARIFIN JAKA J

[COMPANIES WINDING-UP KOD: D3-28-481-96(3)]

30 OCTOBER 1998

COMPANY LAW: *Winding-up - Opposition to petition - Arrears of interests from date of auction sale to date of receipt of money - Whether a debt owed by company to petitioner - Whether company's liability to settle judgment debt ceased on date of auction sale - Whether petitioner's claim was based on judgment or order for sale - Whether judgment sum was only satisfied when petitioner received money with accrued interest*

c

COMPANY LAW: *Winding-up - Insolvency - Whether just and equitable that company be wound up - Whether company was able to pay debts - Whether there was proof of solvency*

d

The petitioner, a licensed local commercial bank, applied to this court to wind up a company ('the company') under the Companies Act 1965 ('the Act') on the ground that the company was unable to pay its debts and that it was just and equitable that the company be wound up.

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Prior to this action, the petitioner had sued the company for the recovery of the sum of RM3,349,672.66 owed by the company to the petitioner based on a loan agreement and a supplemental agreement ('the loan agreements'). The petitioner had obtained a judgment in default of appearance ('the judgment') against the company wherein the company was ordered to pay the said sum. The company did not apply to set aside the judgment. The petitioner had also obtained an order for sale by public auction of a property ('the property') which was one of the securities for the loan facility, charged in favour of the petitioner.

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Pursuant to the order for sale, the property was sold by public auction on 26 April 1995 for RM8,402,000. On the same date, the petitioner rendered a statement of accounts stating the amount due inclusive of interest for RM4,176,369.70. This amount was paid to the petitioner out of the proceeds of sale only on 16 May 1996. The petitioner, then claimed for the sum of RM502,276.81, being the interest on the judgment sum for the period from 27 April 1995, ie, the date after the auction, to 16 May 1996, ie, the date of receipt of the amount due from the proceeds of auction. When the company

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a did not respond to its notice of demand for the said sum pursuant to s. 218 of the Act, the petitioner filed this instant application.

b The company opposed the petition solely on the ground that the amount claimed by the petitioner was not a debt owed by the company to the petitioner. The company claimed that as the amount due under the charge and the judgment as at date of sale of the property was the same, settlement of one would extinguish the petitioner's right under the other. Also, the cut-off point of the company's liability under the judgment and the loan agreements was the date of the auction sale, ie, 26 April 1995. It followed therefore, that the petitioner could not claim any additional interest on the judgment as all the debt owed by the company to the petitioner had been settled on that date. *c* The company relied on the cases of *American International Assurance Company Ltd v. Union Builders (M) Sdn Bhd* and *Aman v. Southern Railway Company* for support.

d **Held:**

e [1] The case of *American International Assurance Company Ltd v. Union Builders (M) Sdn Bhd* decided that a chargee is entitled to payment inclusive of interest at the agreed rate up to the date of the sale. It is not authority for the proposition that a chargee is not entitled to payment of interest under a separate judgment obtained by the chargee based on a loan agreement.

f [2] The issue in *Aman v. Southern Railway Company* related to the payment of arrears of interest with limitations which were expressly stated in a statute. In this instance, the issue was on the interest on a judgment which was not subject to any limitation in any statute. As such, *Aman's* case was distinguishable.

g [3] An order for sale pursuant to s. 256 of the National Land Code 1965 is not a judgment. Since the petitioner's claim was based on a judgment and not on the order for sale in the foreclosure proceedings, the petitioner was entitled to claim the arrears of interests from the date of sale to the date when the sum was finally received by them.

h [3a] The petitioner could only use the money from the date it received payment. Therefore, it was unjust and inequitable to deprive the petitioner of the interests which it claimed. The judgment sum was only satisfied when the petitioner received the money and such amount should include the accrued interest as stated in the judgment up to that date being the date of final payment or realisation. Thus, the respondent owed the petitioner the sum of RM502,276.81 as stated in the notice of demand. *i*

[4] The company had not complied with the notice of demand and no payment had been made. There was also no evidence to show that the company was able to settle its debts. On the other hand, there was evidence to show that the company was dormant for a few years. The company did not adduce any evidence at all to show or even to suggest that it was solvent. It only claimed that the amount realised from the proceeds of the sale was almost double the amount claimed by the petitioner. The excess money did not belong to the company. It should be released to the chargor. In the circumstances, the company was unable to pay its debts and was, therefore, insolvent.

[Winding-up ordered.]

Cases referred to:

Aman v. Southern Railway Company [1926] 1 KB 59 (*dist*)

American International Assurance Company Ltd v. Union Builders (M) Sdn Bhd
[1993] 1 MLJ 95 (*refd*)

Kandiah Peter v. Public Bank Bhd [1993] 4 CLJ 332 (*fol*)

Malaysian International Merchant Bankers Bhd v. Dhanoa Sdn Bhd [1988] 1 CLJ 8 (*cit*)

Legislation referred to:

Companies Act 1965, s. 218

National Land Code 1965, ss. 254, 256 268

For the petitioner - M/s Thangraj & Assoc

For the respondent - M/s Nik Hussain & Partners

Reported by Usha Thiagarajah

JUDGMENT

Arifin Jaka J:

This is a petition presented on 20 December 1996 by Bank of Commerce (M) Bhd ('the petitioner') a licenced local commercial bank, formerly known as United Asian Bank Berhad, for the winding up by the court under the provision of the Companies Act 1965 ('the Act') of Selangor Frits & Glazes Sdn. Bhd ('the company') on the ground that the company was unable to pay its debts and that it was just and equitable that the company should be wound up.

The facts are straight forward and are not really disputed. The petitioner sued the company in Shah Alam High Court *vide* Suit No: 22-298-93 ("the civil suit") based on a loan agreement dated 28 November 1990 and a supplemental agreement dated 28 January 1992 (hereinafter collectively called "the loan agreements") executed between the company as the borrower and the petitioner as the manager and agent, and the several banks (hereinafter called "the co-

- a* lenders”) that appear in the first schedule to the loan agreements. Pursuant to the loan agreements the company was granted by the co-lenders a syndicated loan facility in the maximum aggregate principal sum of RM18,200,000 made up of a term loan facility of up to a maximum principal sum of RM15,000,000 and a diverse banking and credit facilities of up to a maximum principal sum
- b* of RM3,200,000 or as additional working capital. One of the securities for the loan facility was a third party charge in favour of the petitioner over a property held under H.S. (D) 54826, P.T. No. 15637, Mukim Petaling registered in the name of Kenanga Sari (M) Sdn. Bhd. (“the said land.”)
- c* As at 29 March 1993 the company owed the petitioner the sum of RM3,349,672.66. By a letter dated 11 May 1993 the petitioner through its solicitors to the company demanded for payment of the said sum of RM3,349,672.66 with interests as stipulated in the loan agreements from 30 March 1993 until full payment. The company had failed to pay the said sum or any sum at all. On 10 June 1993 the petitioner filed the civil suit in the
- d* Shah Alam High Court for the recovery of said sum. A judgment in default of appearance (“the judgment”) dated 27 July 1993 was entered against the company whereby the defendant “hendaklah membayar kepada plaintiff jumlah sebanyak RM3,349,672.66 di bawah kemudahan pinjaman berkala (term loan)”. The company did not set aside the judgment.
- e* The petitioner had also filed on 17 June 1993, a foreclosure proceedings *vide* Saman Pemula No. 24-424-93 against Kenanga Sari (M) Sdn. Bhd. also in the High Court at Shah Alam for an order that the said land be sold by public auction to realise the sum of RM3,349,672.66 then due as at 29 March 1993. The order for sale by public auction of the said land was obtained by the
- f* petitioner on 10 March 1994 in the foreclosure proceedings. Pursuant to the order the said land was sold by a public auction which was held on 26 April 1995 for a price of RM8,402,000. The petitioner rendered a statement of account as at 26 April 1995 stating the total amount due inclusive of interest was RM4,176,369.70 (exh. R10 in encl. 9). This amount was paid to the
- g* petitioner out of the proceeds of sale of the said land only on 16 May 1996. The petitioner claims the sum of RM502,276.81 being the interest on the judgment sum for the period from 27 April 1995 (date immediately after the auction) to 16 May 1996 (date of receipt of the amount due from the proceeds of auction).
- h* This is the amount claimed by the petitioner in the notice of demand pursuant to s. 218 of the Act. The notice of demand was served on the company on 20 November 1996. The company not only did not respond to the demand but had neglected to pay or secure or compound to the reasonable satisfaction of the petitioner the said sum as demanded within 21 days from the date of
- i* service of the demand. The petitioner filed this petition on 20 December 1996.

On 4 March 1997 the company filed a notice of motion praying *inter alia* that the petition be struck off or alternatively that the petition be stayed. The application was withdrawn. Both parties agreed that the affidavit in support of the application (encl. 9) be treated as an affidavit in opposition to the petition. The company opposed the petition solely on the ground that the amount claimed by the petitioner was not a debt owed by the company to the petitioner. It is not in dispute that the petitioner was paid the sum of RM4,176,369.70 being the amount due as at 26 April 1995 that is the date of sale and this amount is the amount due under the order for sale and the judgment as at that date. The question that arises is whether the company's liability to settle the judgment debt ceased on the date of the auction sale.

The learned counsel for the company submitted that as the amount due under the charge and the judgment as at date of sale of the land was the same, settlement of one will extinguish the petitioner's right under the other. It was also contended that the cut-off point of the company's liability under the judgment and the loan agreements was the date of the auction sale, that is 26 April 1995. It follows therefore that the petitioner cannot claim any additional interest on the judgment as all the debt owed by the company to the petitioner had been settled on that date.

The learned counsel relied on the case of *American International Assurance Company Ltd. v. Union Builders (M) Sdn. Bhd.* [1993] 1 MLJ 95 for the proposition that the cut-off point of the company's liability was the date of the auction sale. That case dealt with the question of interest on the sum due in a foreclosure proceedings. In that case the chargees of certain lands on the security whereof the chargor was granted a loan bearing interest at 11% per annum instituted a foreclosure proceedings when the chargor defaulted in payment of a number of instalments as well as interest. Due notice of default was given as in Form 16D under s. 254 of the National Land Code 1965. The chargee sought to recover the sum of \$1,401,596.24 due as on 31 August 1970 together with interest at the agreed rate of 11% per annum from 1 September 1970 to the date of payment or realisation. An order was made by the High Court that the charged lands be sold by public auction to recover the said sum together with interest thereon at 11% per annum from 1 September 1970 to the date of the order and further interest thereafter at 6% per annum to date of payment or realisation. The chargees appealed against that order in so far as it relates to the payment of interest at 6% from date of order. The chargees maintained that they were entitled to claim full interest at 11% per annum until date of realisation. The then Federal Court allowed the appeal and held that as the appellant's (chargee's) claim was not on a covenant but in exercise of their statutory right under the National Land Code against the chargor in default there could not be any merger in the judgment and the chargees were therefore entitled to interest at the agreed rate, that is 11% until realisation of the security.

- a* Ong CJ (Malaya) referred to s. 268 of the National Land Code and said at p. 96:

It may also be observed that section 268 provides for priorities in the application of the proceeds of sale, first towards land rent, secondly expenses connected with the sale and then as follows:

- b* (c) Thirdly, in the payment to the chargee of the total amount due under the charge at the time of sale.

- c* His Lordship further opined that the words “total amount due under the charge at the time of sale” indicate that interest continues to accrue at the agreed rate until sale.

- d* Therefore what the case decides is that the chargee is entitled to payment inclusive of interest at the agreed rate up to date of sale. I am of the view that it is not authority for the proposition that the chargee is not enabled to payment of interest under a separate judgment obtained by the chargee based on the loan agreement.

- e* The learned counsel also referred to *Aman v. Southern Railway Company* [1926] 1 KB 59 to support his contention that the amount claimed by the petitioner is not sustainable as payment from the proceeds of the sale has extinguished the petitioner’s claim for the interest. In my opinion *Aman’s* case is clearly distinguishable from the facts of the present case. There the plaintiff’s claim was founded on a judgment which had been assigned to him. The judgment was against a railway company for arrears of interest on some of its debenture stock. The said debenture stock with arrears of interest thereon,
- f* was purchased by the plaintiff who also took an assignment of the debt. Pursuant to an absorption scheme under the Railways Act 1921 the railway in question was absorbed in and its liabilities were transferred to the defendant railway company. It was also in accordance with the absorption scheme that stock of the defendant railway company was allocated to the plaintiff *in lieu* of the stock of the absorbed company held by them “in substitution for the stock of the (absorbed) company held by them and in satisfaction of all claims there under including any arrears of interest.”
- g*

- h* It is clear therefore the issue in that case concerns the payment of arrears of interest with limitations which was expressly stated in a statute. In the instant case the issue is on the interest on a judgment which is not subject to any limitation in any statute. For this reason *Aman’s* case is distinguishable on the facts and does not apply to the present case.

- i* It is trite that an order for sale pursuant to s. 256 of the National Land Code is not a judgment (see *Malaysian International Merchant Bankers Bhd. v. Dhanoa Sdn. Bhd.* [1988] 1 CLJ 8; [1988] 1 MLJ 257).

In *Kandiah Peter v. Public Bank Bhd* [1994] 1 MLJ 119 at p. 122, where Eusoff Chin SCJ (as his Lordship then was) in explaining the nature of an order for sale in foreclosure proceedings said:

A chargee who makes an application for an order for sale in foreclosure proceedings under s. 256 of the Code (National Land Code) does not commence an action. He merely enforces his right as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a covenant but under the registered charge. The order for sale when made under section 256 of the Code (the National Land Code) is not a judgment or a decree. The court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue.

Applying the principles emaciated in the above two cases I am of the opinion that since the petitioner's claim in the instant case is based on a judgment and not on the order of sale in the foreclosure proceedings the petitioners are entitled to claim the arrears of interests from the date of sale to the date when the sum was finally received by them. The petitioner could only use the money from the date he received payment. For this reason it is unjust and inequitable to deprive the petitioner of the interests which they claimed. I rule that the judgment sum is only satisfied when the petitioners received the money and that such amount should include the accrued interest as stated in the judgment up to that date being the date of final payment or realisation. My judgment is therefore that respondent owed the petitioners the sum of RM502,276.81 as stated in the notice of demand.

The final question I have to decide is whether the company is deemed unable to pay its debt. It is not disputed that the company had not complied with the notice of demand and no payment has been made. In addition there is no evidence to support that the company is able to settle its debts due to the company. On the other hand there is evidence to show that the company has been dormant for a few years. The company did not adduce any evidence at all to show or even to suggest they are solvent. They only say that the amount realised from the proceeds of sale is almost double the amount claimed by the petitioners. The excess money does not belong to the company. It should be released to the chargor. It is my finding that the company is unable to pay the debt and it is insolvent.

In the above premises I make an order that the company be wound up under the provision of the Act, the official receiver is appointed as a provisional liquidator and costs of the petition be paid out of the assets of the company to be taxed.